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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 25)
of the Cable Television Consumer)
Protection Act of 1992) MM Docket No. 93-25
)
Direct Broadcast Satellite)
Public Service Obligations)

REPLY COMMENTS OF
GE AMERICAN COMMUNICATIONS, INC.

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Summary

In these reply comments, GE American Communications, Inc. ("GE Americom) addresses the question whether the Ku-band satellite operator licensed under Part 25 or the entity using transponders on that Ku-band satellite to distribute DTH service is responsible to provide capacity for noncommercial educational and informational programming required by Section 25 of the Cable Act.

The statutory language, the legislative history, and the practical application of Section 25 mandate that the distributor of the DTH service is the party to whom the Commission must look for satisfaction of the Section 25 requirements.

If, nevertheless, the Commission determines that the Part 25 licensee is responsible for meeting the requirements of Section 25 of the Cable Act, then the Commission should permit the licensees to delegate their responsibilities to their customers who are distributors of DTH services.

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of the Act. They are misreading Section 25 and apparently do not understand the serious problems that would arise if fixed satellite licensees are expected to satisfy the Act's carriage requirements. For the reasons set out below, GE Americom requests that the Commission reconfirm that those obligations fall on those entities using Ku-band fixed satellite capacity to provide direct-to-home ("DTH") program service.³

I.

THE PLAIN MEANING OF THE STATUTE AND ITS LEGISLATIVE HISTORY
PLACE PROGRAM CARRIAGE REQUIREMENTS UPON DTH DISTRIBUTORS

The plain meaning of Section 25 itself demonstrates that a Part 25 Ku-band satellite licensee is not subject to the Act's program carriage requirements. Indeed, the Act could not be more clear on this point. Section 25(b)(1) of the Act imposes the carriage requirements only on "providers of direct broadcast satellite service providing video programming."⁴ Subsection 5(a)(ii) then defines a "provider" for DTH services provided over fixed Ku-band satellites. The focus of that definition is on a "distributor" who uses "a Ku-band fixed service satellite for the

³ As the Commission knows, GE Americom is currently licensed under Part 25 to operate two Ku-band satellites and is constructing a C-band/Ku-band hybrid satellite. Primestar Partners, L.P. ("Primestar") is today using 11 Ku-band transponders on Satcom K-1 to provide DTH programming. GE Americom holds a minority partnership investment in Primestar but its perspective on the allocation of Section 25 carriage obligations differs from that of Primestar.

⁴ 47 U.S.C.A. § 335(b)(1).

provision of video programming directly to the home* * *."⁵

Thus, by the Act's express terms, the carriage obligations of Section 25 do not attach to a fixed Ku-band satellite licensee's marketing of communications bandwidth -- devoid of program content. The licensee of such a satellite is not "providing video programming" as required by both the definitional and substantive elements of Section 25(b). Instead, the Section 25 carriage obligations attach only to a "distributor." The Commission correctly observes in the Notice that:

distributors would include parties engaged in various activities related to the delivery of video entertainment programming, such as program packaging, program delivery, subscription billing and consumer service.

This approach is consonant with the definition of a "multichannel video programming distributor" used elsewhere in the Act, which is a "person * * * who makes available for purchase, by subscribers or customers, multiple channels of programming."⁷ Since multichannel video programming distributors and Ku-band distributors of DTH programming engage in essentially

Act's legislative history. Congress clearly recognized that Part 25 licensees are carriers who provide only bare satellite capacity to third party customers. At the same time Congress recognized that Part 25 Ku-band capacity can, as a technical matter, be used for DTH service by the carriers' customers (or customers of those customers in the case of resale). In fact, Congress undoubtedly was aware that Primestar already was using

Part 25 Ku-band capacity for DTH service. That is, the Commission

issue is what meaning to give to the words "and licensed under part 25 of title 47 of the Code of Federal Regulations."

Primestar's contention is that, since programmers are not licensed, Congress must have intended to impose the obligation on Part 25 satellite operators, which are licensed.

However, this argument is simply not logical. First of all, the argument ignores the fact that the concept of "distributor" is a core element of Section 25 and cannot be read out of the definition. Therefore, the "and licensed under part 25" clause is susceptible to only two possible interpretations: either (1) the carriage obligation attaches only to a DTH program distributor that is also a Part 25 licensee; or (2) the

subsection 5(a)(i). That subsection expressly imposes the program carriage responsibility on the Part 100 "licensee." This approach is reasonable because such licensees are granted spectrum specifically to them so that they can provide DBS programming services themselves. Congress presumably would have been equally express in imposing the carriage responsibilities on Part 25 licensees if that had been its intent -- but it did not do so. Instead, subsection 5(a)(ii) focusses on "distributors" recognizing that, in the case of Part 25 satellites, the licensee only markets bare transmission capacity. Thus, contrary to the strained construction proposed by Primestar, the reference in subsection 5(a)(ii) to a system "licensed under part 25" actually emphasizes that Part 25 licensees were not intended to bear carriage obligations. If Congress had intended to impose the carriage duty on both Part 100 and Part 25 licensees, it would not have needed to create two different definitions of

provision, initial authorization or authorization renewal for a provider of direct broadcast satellite service providing video programming." Primestar argues that this is further evidence that only licensees (Part 100 or Part 25) bear the carriage duty.⁹ Again, however, at a minimum, a Part 25 licensee is not defined as subject to the duty at all unless it is a "distributor", so what the commenters must be claiming is that subsection (b)(1) does not support imposing the duty on a program distributor unless it also is a licensee.

In any event, this argument ignores the fact that the subsection refers to "provision" or "authorization". Thus, the subsection actually is additional evidence that non-licensees can be subject to the carriage obligation when they use fixed Ku-band satellites -- but not until and unless they use the satellite capacity for DTH program service. This is an entirely sensible approach to defining when the carriage obligation attaches to non-licensee program distributors. The subsection actually further underscores why Part 25 licensees who are not distributors are not covered by subsection 5(a)(ii). Under subsection (b)(1) the carriage duty does not attach until the provider actually is "providing video programming." A Part 25 carrier licensee does not provide video programming but a distributor of DTH programming does do so.

Finally, APTS/CPB suggests that Congress must have intended the carriage obligation to rest with Part 25 licensees because

⁹ Primestar at 9.

the Commission does not have adequate ability to enforce the duty against non-licensees.¹⁰ This argument can be dismissed out of hand. Congress clearly was satisfied that the Commission's enforcement powers outside of Title III were sufficient for purposes of other sections of the Act. Most obviously, no party

100 systems is underscored when one considers the administrative problems that would prevent Part 25 operators from effectively meeting the programming requirements of the Act. The Act's allocation of responsibility to the program distributor is consistent with the Part 25 licensee obligations as a telecommunications carrier and is necessary from an operational standpoint.

As a practical matter, the imposition of the programming requirements upon a Part 25 satellite operator would be extremely difficult, if not impossible to implement, and would lead to anomalous results that were not intended under the Act. On the other hand, assumption of these responsibilities by a firm using transponder capacity on a Part 25 satellite to distribute DTH video programming could easily be implemented.

Two examples are sufficient to show that Section 25 obligations cannot rationally be made to apply to satellite operators rather than to distributors of DTH services: the ascertainment of the "trigger" point at which Section 25 responsibilities are activated and the provisioning of transponders necessary to carry out these responsibilities.

A. Ku-Band Satellite Licensees Do Not Control And are Not Always Able to Determine When an Obligation Arises Under Section 25

As between a Part 25 satellite operator and a distributor of DTH video services, only the latter can control the point at which the Section 25 programming obligation arises.

The Commission has asked for comments regarding the

appropriate number of DTH channels that would be sufficient to activate the responsibility of making available capacity for Section 25 programming.¹¹ The Act recognizes that the only practical approach is to focus on the number of channels operated by a given DTH program service vendor and to impose the Section 25 responsibilities upon that vendor based upon 4 percent to 7

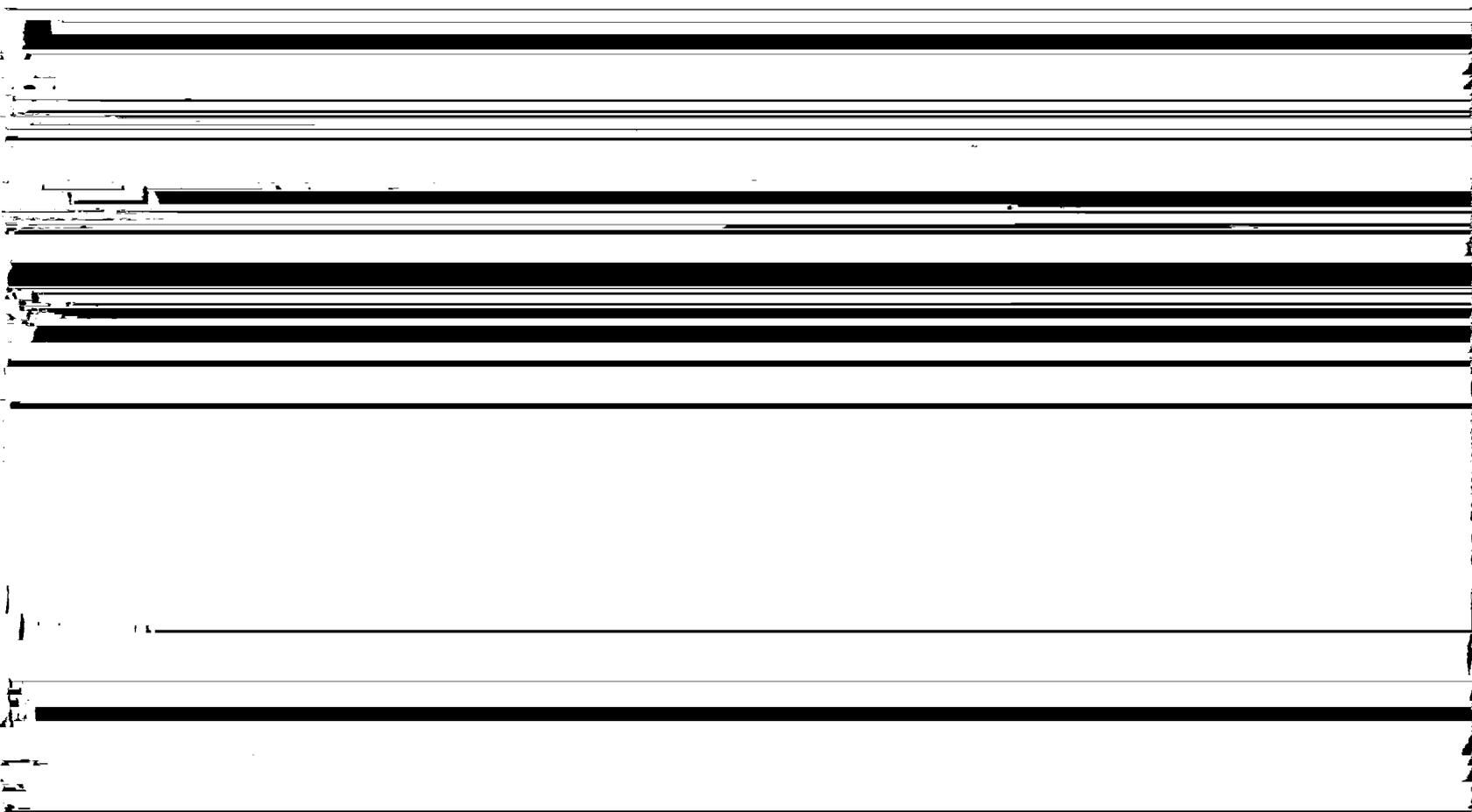
its satellite communications services so long as the customers do not cause interference to others. Customers, not Ku-band satellite operators, should decide how to use satellite communications services to meet their own customers' needs. Imposing Section 25 carriage requirements on a satellite operator driven by the DTH decisions, made by the operator's customers, however, would require that the operator involve itself, for the first time, in the communications services decisions made by its customers.

Leaving aside control issues, GE Americom must also stress that the licensee of a Part 25 satellite will not always even have information about the extent of DTH usage of its transponders. Because customers arrange for third-party uplinks or uplink their own signals, GE Americom does not have advance knowledge of the nature of the services to be provided by its customers and can obtain that information only occasionally and only as an incidental consequence of performing other functions related to maintenance of the transmission medium. This lack of knowledge is made all the more significant by the advent of digital compression of video signals. Virtually all commenters pointed to the imminence of compressed digital video television, and many have urged the Commission to establish the trigger point at the number of compressed channels used to deliver DTH services.¹² Because compression is a not a function of the satellite transmission medium but rather is implemented on each

¹² E.g., DirectTV at 9-11.

end of the satellite transmission by facilities not usually controlled by the satellite operator, a Ku-band satellite operator has no control over whether a particular customer uses compression, how many compressed channels are created by that customer, or how many of such compressed channels are engaged in DTH service as distinct from cable service or other use. Accordingly, if Section 25 obligations were imposed on a Ku-band satellite operator, it would not be in a position to determine whether or when these obligations would become operative.

The inability of a Ku-band satellite operator to control the nature and form of the use made by its customers is further complicated by the fact that satellite customer usage patterns



25 obligations, these factors would, even separately, make it impossible for GE Americom to know when to comply with the requirements of Section 25 of the Cable Act. Part 25 licensees are satellite carriers that lack control over, or even information about how customers use transponder capacity. Congress therefore wisely recognized that, because such licensees cannot control the triggering or scope of the noncommercial carriage obligation, they should not be required to assume responsibility for compliance with it. Instead, the obligation properly falls on the parties that distribute video programming and make the decisions which establish the nature and amount of such programming. The comments of Primestar and DirectTV show the simplicity with which they, as program distributors, could calculate when the number of channels of their DTH programming services reaches a level sufficient to trigger Section 25 obligations.

B. Requiring a Ku-Band Satellite Licensee to Assume Noncommercial Programming Requirements Would Lead to Distorted Results

The Act recognizes that to impose Section 25 requirements on licensees would introduce uncertainty, raise costs by requiring satellite capacity to be reserved in non-productive use, disrupt non-DTH customers and possibly deter the use of satellite capacity for DTH purposes. It is the position of APTS/CPB however, that whenever a user of a Ku-band satellite provides a certain minimum quantity of DTH services, the entire satellite becomes subject to the noncommercial programming requirements of

Section 25.¹³

Under this approach, GE Americom could be required to displace certain customers on its satellites. The amount of capacity required would not be inconsiderable under the APTS/CPB proposal. If, for example, one of GE Americom's customers were using a single transponder to provide DTH service, GE Americom would be required to set apart a certain block of time per day on another Ku-band transponder.¹⁴ In actuality, for Satcom K-1, on which Primestar operates eleven transponders in DTH service, APTS/CPB would require that approximately eighteen hours of noncommercial educational and information programming be available daily.¹⁵

APTS/CPB fails to recognize, much less address, the severe pragmatic drawbacks resulting from such a scenario. While Section 25(b)(2) permits GE Americom to lease such capacity to private users until a call is made for noncommercial educational

¹³ Comments at 15. The view of APTS/CPB seems to be further that a Ku-band satellite would become subject to Section 25 obligations when two or more providers of direct-to-home services provide an aggregate amount of channels which exceeds the trigger point, even though, if considered separately, each would be below this threshold.

¹⁴ Using APTS/CPB's formula (Comments at 15-17), the amount of time dedicated to Section 25 programming would be calculated by multiplying the number of transponders engaged in DTH service times twenty four hours times a minimum of 4 percent. Further, APTS/CPB seeks that the Commission raise the amount of capacity for section 25 programming to 7 percent after a certain period, regardless of the penetration of direct-to-home service (Ibid. at 18).

¹⁵ 11 transponders x 24 hours x 7% = 18.48

and informational programming, this is of little practical value. GE Americom's experience has been that satellite customers place so great a premium on availability of service that few, if any, potential customers would be interested in leasing a transponder that could be preempted upon short notice.

In addition, all transponders on Satcom K-1 and K-2 are currently under contract, many of which last until the end-of-life of these satellites. Because of the critical importance placed by satellite customers upon continuity of service, APTS/CPB's proposal also fails to address, if granted its wish that existing contracts not be grandfathered,¹⁶ the identity or identities of users whose services must be terminated in order to provide access for educational and informational programming or what defenses GE Americom would have to a breach-of-contract claim resulting from termination to an affected customer, or indeed the basis for assigning priority in terminating services to customers.

All of these problems presented by the APTS/CPB position would not be encountered if the obligation to provide access for such programming were placed, as the statute and the legislative history require, upon the parties that use Ku-band transponders to distribute programming directly to consumers in their homes. In such cases, the capacity committed to Section 25 programming would be based upon the number of channels that a DTH video distributor operates. The comments of both DirectTV and

¹⁶ Comments at 19.

Primestar offer constructive and workable suggestions as to how this could be accomplished.

III.

IF KU-BAND SATELLITE LICENSEES ARE RESPONSIBLE
FOR ADMINISTRATION OF THE PROGRAM, THEY
SHOULD BE ALLOWED TO DELEGATE THEIR RESPONSIBILITIES
TO CUSTOMERS UNDER CONTRACT

For the reasons already given, GE Americom believes that the literal language of Section 25, its legislative history, and the practical realities taken together point to the inescapable conclusion that transponder users that distribute programming directly to consumers in their homes should be responsible for Section 25 obligations, rather than Ku-band licensees. Otherwise, the only practical way in which satellite licensees could be able to discharge such obligations would be to delegate these responsibilities to entities that control the use of the transponders. This is the result that both Primestar and DirectTV anticipate in their comments.¹⁷

But this is just further evidence that, logically, the responsibility for providing Section 25 programming should be placed on the firms that use satellite capacity to distribute DTH programming rather than on licensees. The function of placing the responsibility on the licensee is then merely to enable the licensee to delegate this responsibility to the DBS providers -- the parties best able to carry them out.

Nevertheless, if the Commission adopts a reading contrary to

¹⁷ DirectTV comments at 7-8; Primestar comments at 10.

this position, then it must allow such delegation completely. This includes delegation of the amount of the DBS distributor's capacity that should be reserved for qualifying noncommercial educational and informational programming. Delegation of these responsibilities to DTH provider-customers would also require that the rates to be paid for such capacity be fifty percent of the "direct costs" of the customer, not the "direct costs" of the licensee.¹⁸ Finally, as Primestar suggests, once such a delegation has occurred the Commission should look exclusively to the DTH provider for satisfaction of Section 25 obligations.¹⁹

Conclusion

The plain meaning of the Act as well as its legislative history place the responsibility for fulfilling the Section 25 requirements of the Act on distributors of DTH programming rather than on Part 25 satellite licensees. A contrary reading would be difficult, if not impossible to implement. Nevertheless, if the Commission interprets the Act to place Section 25 responsibility on the Part 25 licensee, it should allow Part 25 licensees to delegate their responsibilities to their customers who provide

¹⁸ See Primestar Comments at 19.

¹⁹ Comments at 10.

DTH video services and it should look exclusively to such customers for compliance with Section 25.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alexander P. Humphrey". The signature is written in a cursive style with a large, prominent initial "A".

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Certificate of Service

I, Wanda M. Latta, hereby certify that on this 14th day of July, 1993, copies of the foregoing Reply Comments of GE American Communications, Inc., in the matter of Implementation of Section 25 of the Cable Television Consumer Protection Act of 1992, Direct Broadcast Satellite Public Service Obligations, have been served by first-class United States mail, postage prepaid, on the parties shown on the attached list.

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